FILE COPY

No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
Summary of argument	13
Argument	16
I. The Commission properly limited the permit by specifying the types of business for which appellant was authorized to haul	16
A. Section 209 of the Interstate Commerce Act empowers the Commission to limit "grandfather" permits to the class of shippers served	20
B. Analysis of Section 209	24
C. To satisfy the policy of the Act, the "grandfather" permit involved must be restricted to the class of shippers served	34
II. The Commission's action with respect to the Kraft-Phenix Cheese Corporation contract is correct	41
III. The Commission rightly defined the territorial limits of appellant's operation	45
IV. Appellant received a fair hearing	46
Conclusion	46
Appendix	48

CITATIONS

Cases:	
Alton R. Co. v. *United States*, 315 U. S. 15	15, 35, 41, 45
Beekley, Contract Carrier Application, 27 M. C. C. 405	35
Benjamin Franklin Line, Common Carrier Application, 1 M. C. C. 97	42
Caravans, Inc., Contract Carrier Application, 9 M. C. C. 659	25
Clancy, Common Carrier Application, 24 M. C. C. 727	35
Contracts of Contract Carriers, 1 M. C. C. 628	19
Craig, Contract Carrier Application, 28 M. C. C. 629	19
Doudell, Contract Carrier Application, 17 M. C. C. 684	19
Filing of Contracts by Contract Carriers, 2 M. C. C. 55	19

Cases—Continued. Page

Gregg Cartage & Storage Co. v. United States, 316 U. S. 74 . . . 15, 43
H. B. Church Truck Service Co., Common Carrier Application, 27 M. C. C. 191 . . . 35
Helvering v. Reynolds Co., 306 U. S. 110 . . . 27
Howard Hall Co. v. United States, 315 U. S. 495 . . . 45
Hunter, Contract Carrier Application, 13 M. C. C. 109 . . . 25
Inter-City Transport & Motor Co., Extension of Operations, 22 M. C. C. 588 . . . 34
Jones, Extension of Operations, 21 M. C. C. 470 . . . 34
Keystone Transp. Co., Contract Carrier Application, 19 M. C. C. 475 . . . 10, 22, 26, 29, 30, 32, 34
Knight, Contract Carrier Application, 30 M. C. C. 500 . . . 27
Koelker, Contract Carrier Application, 22 M. C. C. 474 . . . 26, 34
Longshore, Contract Carrier Application, 2 M. C. C. 480 . . . 26, 30
Loving v. United States, 32 F. Supp. 464, affirmed, 310 U. S. 609 . . . 43
Marianelli, Contract Carrier Application, 22 M. C. C. 142 . . . 26
Maring Trucking Co., Inc., Contract Carrier Application, 17 M. C. C. 615 . . . 25
McCaughn v. Hershey Chocolate Co., 283 U. S. 488 . . . 26, 27
McDonald v. Thompson, 305 U. S. 263 . . . 15, 43
Morgan v. United States, 298 U. S. 468 . . . 16, 46
Motor Convoy, Inc., Contract Carrier Application, 2 M. C. C. 197 . . . 25
Noble Extension of Operations—Points in Illinois, Wisconsin, and Minnesota, 34 M. C. C. 671 . . . 15, 44, 46
Norwegian Nitrogen Co. v. United States, 288 U. S. 294 . . . 26
Puzio, Contract Carrier Application, 26 M. C. C. 555 . . . 27
Red Circle Freight Lines, Inc., Contract Carrier Application, 24 M. C. C. 319 . . . 27
Shipman Bros. Transfer Co., Contract Carrier Application, 23 M. C. C. 355 . . . 26
Sproles v. Binford, 286 U. S. 374 . . . 43
Stepanek, Contract Carrier Application, 21 M. C. C. 612 . . . 34
Storch Trucking Co., Inc., Contract Carrier Application, 17 M. C. C. 349 . . . 25
Swift & Co. v. United States, 276 U. S. 311 . . . 8
United States v. American Trucking Associations, 310 U. S. 534 . . . 26
United States v. Carolina Freight Carriers Corp., 315 U. S. 475 . . . 15, 31, 43, 45
United States v. Chicago North Shore R. Co., 288 U. S. 1 . . . 26
United States v. Swift & Co., 276 U. S. 311 . . . 8
Virginian Ry. Co. v. United States, 272 U. S. 658 . . . 30
Wible, Contract Carrier Application, 7 M. C. C. 105 . . . 25
Wilgis, Common Carrier Application, 23 M. C. C. 87 . . . 34

Statutes:

	Page
Interstate Commerce Act, Part II:	
Sec. 203 (1) (49 U. S. C. 303 (1))	13
Sec. 203 (a) (14) (49 U. S. C. 303 (a) (14))	18
Sec. 203 (a) (15) (49 U. S. C. 303 (a) (15))	16, 32
Sec. 203 (14) (49 U. S. C. 303 (14))	49
Sec. 203 (15) (49 U. S. C. 303 (15))	49
Sec. 204 (a) (6) (49 U. S. C. 304 (a) (6))	49
Sec. 206 (49 U. S. C. 306)	41
Sec. 209 (a) (49 U. S. C. 309 (a))	3, 15, 16, 21, 24, 28, 42, 50
Sec. 209 (b) (49 U. S. C. 309 (b))	13, 17, 21, 24, 25, 26, 30, 37, 43, 44, 51
Sec. 216 (49 U. S. C. 316)	37
Sec. 217 (49 U. S. C. 317)	37,
Sec. 218 (a) (49 U. S. C. 318 (a))	37, 52
Sec. 218 (b) (49 U. S. C. 318 (b))	36, 54
Motor Carrier Act of 1935 (49 Stat. 543):	
Sec. 202 (a)	37
Transportation Act of 1940 (54 Stat. 898):	
Sec. 1	37, 48

Miscellaneous:

79 Cong. Rec. 5651	28
79 Cong. Rec. 5654	17, 27, 28, 42
79 Cong. Rec. 5664	28
86 Cong. Rec. 11546	33, 39,
Hearings, S. Committee on Interstate Commerce, S. 1629, 74th Cong., 1st sess., p. 123	28
H. Rep. No. 1645, 74th Cong., 1st sess., p. 4	32
S. Doc. No. 152, 73rd Cong., 2d sess., p. 33	37
S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3	37

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 511

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 332–346) is reported in 45 F. Supp. 793. The report of the Interstate Commerce Commission (R. 14–24) appears in 28 M. C. C. 653.

JURISDICTION

The final decree of the district court was entered on July 24, 1942 (R. 349). The petition for appeal was presented on August 10, 1942, and was allowed on the same day (R. 350–351). The juris-

diction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

STATUTE INVOLVED

The relevant provisions of the Transportation Act of 1940 and the Interstate Commerce Act, Part II, are set forth in the Appendix, *infra*, pp. 48–51.

QUESTIONS PRESENTED

The Commission, acting under the so-called "grandfather" clause of Section 209 (a) of the Interstate Commerce Act, issued a permit to appellant authorizing the continuance of his operations as a contract carrier by motor vehicle, under individual contracts with "persons" who operate food canneries or meat-packing businesses, of specified commodities (canned foods, fresh meats, dairy products, and packinghouse products and supplies), in a described area. The questions presented by this appeal are:

1. Whether the Commission erred in limiting the permit by specifying the types of business for which appellant was authorized to haul.

2. Whether the Commission erred in refusing

to grant appellant a permit based on a contract which was entered into with the Kraft-Phenix Cheese Corporation prior to the "grandfather date" but under which no transportation was in fact performed until eight months later.

3. Whether the Commission unlawfully specified the territorial limits of appellant's operations.

4. Whether appellant was accorded a fair hearing.

STATEMENT

By application filed February 10, 1936, as amended, under the "grandfather" clause of Section 209 (a) of the Interstate Commerce Act, Part II, John F. Noble, doing business as Noble Transit Company of Minneapolis, Minn., sought a permit as a contract carrier by motor vehicle,[1] in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points and areas in the States of Minnesota, Wisconsin, Illinois, Iowa, and North Dakota, over regular and irregular routes (R. 15). Section 209 (a) provides that if a carrier was "in bona fide operation * * * on July 1, 1935, * * * and has so operated since that time," the Commission shall issue such permit without requiring proof of consistency with the public interest.

[1] Appellant's application for a certificate as a common carrier, filed on the same day, was at his request dismissed by the Commission on October 14, 1938 (R. 2).

In his application, appellant stated that he had not undertaken "to transport property for the general public for hire"; that his contracts were with Swift & Company, Libby, McNeill & Libby, Plankington Packing Company and others, and that he was "principally engaged in the business of delivering meats and packing-house products for Swift & Company, South St. Paul, Minn., to various municipalities, towns and cities within the States of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, and is engaged under contract with various concerns in the movement of freight from Chicago and Milwaukee and adjacent towns to St. Paul, South St. Paul, Minneapolis and various points in Minnesota" (see R. 48, 56, 72.) Appellant's contract with Swift & Company was dated November 1, 1934 (R. 38, 41). He was granted a license by the Wisconsin Public Service Commission on November 24, 1934, as an interstate contract carrier, to transport the property of Swift under this contract (see R. 250).

The application received a three-day hearing before Examiner Peterson at St. Paul, Minn., on September 21–23, 1938, at which hearing considerable testimony and numerous exhibits were introduced (R. 31–330). Appellant testified that he began operation in November 1934, and at that time entered "in the field of contract carrier working for Swift & Company," packers (R.

38). He stated that he operated out of South St. Paul, Minneapolis and St. Paul to various points and places in Wisconsin, Iowa, Illinois and North Dakota, and from various places in Illinois, Iowa, and Wisconsin to various places in Minnesota, and from Iowa to places in Illinois, and that he hauled fresh meats, packing-house products, canned goods, butter, eggs, and supplies of all kinds such as machinery, chemicals, and articles too numerous to mention, referred to as branch house supplies (R. 48). He further testified that his schedule was irregular and that "The service was one of supplementing rail service at the time, depending upon which they wanted to use, whether they wanted to send the trucks to those places, or use rails." In November 1934, he operated two trucks. (R. 49.) The witness referred to a contract with Libby, McNeill & Libby and to a contract with the Kraft-Phenix Cheese Corporation, the latter entered into about June 1, 1935, and under which operations were not conducted until March 1936 (R. 55–57). He testified that there was no other industry for ~~whom~~ which he was performing transportation service prior to July 1, 1935, and that there was no other industry for ~~whom~~ which he performed a transportation service or with ~~whom~~ which he had any agreement, verbal or otherwise, after July 1, 1935, and prior to January 1, 1936 (R. 57).

Much additional evidence was introduced at this hearing, after which briefs were filed by appellant and by protesting motor carriers. On December 5, 1939, the examiner who heard the case recommended to the Commission that it find appellant was entitled to continue operation as a contract carrier of fresh meats, packing-house products, packing-house supplies, canned goods and dairy products, over irregular routes from and to certain points in Minnesota, Wisconsin, Illinois and Iowa, by reason of having been engaged in such operations on July 1, 1935, and continuously since then (see R. 3–4). Exceptions were filed by Noble to the examiner's recommended report and competing carriers replied thereto (R. 15).

On May 13, 1941, Division 5 of the Commission rendered its decision (R. 14–15). Appellant filed a petition for reconsideration by the entire Commission (see R. 348), replies thereto were filed, and the Commission, on October 6, 1941, denied the petition (R. 25). Shortly thereafter this suit was brought to set aside the order of the Commission (R. 1). Pending disposition of the proceedings in the district court, the Commission has from time to time, at the request of the court, extended the effective date of its order, and following the decision of the court sustaining the Commission's order (R. 349), a stay order was granted pending determination by this Court (R.

357). Accordingly, the Commission's decision has not yet become effective.

In its report the Commission found that appellant commenced operations in November 1934, as a motor carrier with two trucks under a written contract with Swift & Company, a meat-packing concern, with a plant at South St. Paul, Minn.; appellant was to receive from Swift or its subsidiaries such quantities of their goods as were tendered. No points or territory were specified in the contract, nor were rates quoted or named. The Commission found that the effect of the contract was to place appellant's two trucks at the disposal of Swift and its subsidiaries for use within its South St. Paul trade or shipping area and also out of its Chicago plant, and that he hauled truckloads of "plant sales" under seal from the South St. Paul plant to Swift branch houses and to certain so-called break-bulk points where the commodities were unloaded for subsequent local delivery or reshipment to consuming points by local truckers. (R. 16.) In February 1935, he accepted a further proposal from Swift to extend his operations to provide a through trucking service to the consumer, rather than to turn the shipments over to local carriers at break-bulk points (R. 16); he rebuilt his old equipment and acquired new equipment so that he could perform this highly specialized service. The new service to points beyond the break-bulk

points was not commenced until October 16, 1935, and was thereafter extended to various routes was established by Swift. The last of these routes was instituted in August 1937, long after July 1, 1935, the critical date under the "grandfather" clause. (R. 17.)

It was found that appellant commenced hauling canned goods in February 1935, under a written contract with Libby, McNeill & Libby, of Chicago.[2] Libby is engaged in the canning of foods, and operates a plant at Blue Island, Ill., a locality in the Chicago area. The operations for Libby were performed in conjunction with the Swift operation and all routing and other directions pertaining to the Libby operation were given by Swift. (R. 16.)

A third contract, between appellant and Kraft-Phenix Cheese Corporation, was referred to by the Commission in its report (R. 17). Although entered into on June 1, 1935, no actual operations were performed for Kraft until March 1936, long after the "grandfather" date of July 1, 1935. The Commission rejected this contract as evidence of a "grandfather" operation (*ibid.*) because, as it said:

---

[2] In 1935 the stock of Libby, McNeill & Libby was owned by Swift & Co., although its divestment had been ordered by the Packers' Consent Decree of February 27, 1920. See *Swift & Co.* v. *United States*, 276 U. S. 311, 318; *United States* v. *Swift & Co.*, Sup. Ct., D. C., Eq. No. 37623, Orders of July 8, 1933, November 18, 1939, April 23, 1941, July 29, 1941.

> Mere intention, plans, preparation, or attempts to operate, even though bona fide, do not constitute operation within the meaning of that phrase in section 209 (a) of the act, and having been instituted subsequent to the effective date of the act and being beyond the scope of appellant's "grandfather" rights as hereinafter found, the service rendered this shipper has constituted an unauthorized extension of operations (R. 17).

The Commission's report described appellant's operations on the critical date as consisting of rendering a specialized transportation service in hauling packing-house products, and it discussed in detail the commodities he handled (R. 17–21). Reference was made to the wide diversification of these products, and the finding was made that "All traffic handled by applicant prior to the statutory date and until October 15, 1935, was transported for Libby or for Swift or one of its subsidiaries. Likewise, all of his equipment has refrigerator bodies" (R. 21).

In reaching a conclusion as to the best manner of describing appellant's operations, the Commission pointed out that while he had transported a wide range of commodities, "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products and supplies in the manner hereinbefore described" (R. 22).

Stating that the same problem was presented as that involved in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475, the Commission adopted the general form of authority used in that case "with appropriate modifications" (R. 22). In the *Keystone* case the Commission had considered 122 applications. The operations of the applicants in that case were for the American Stores Company and for the Great Atlantic & Pacific Tea Company, and the Commission concluded that the permit granted should be restricted to the service of persons operating retail stores, the business of which is the sale of food.[3]

The Commission then considered the territorial scope of appellant's operations and found that they have been essentially between specific points, with large volumes of traffic moving between those points (R. 23). The Commission's ultimate findings were:

> We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul,

[3] This restriction with respect to the classes of shippers which might be served has become known in the motor carrier industry as the Keystone restriction.

South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied (R. 23).

An appropriate order to carry out the findings of the Commission was entered (R. 24) on the same day (May 13, 1941) as the decision. This suit was brought (R. 1) following denial by the entire Commission of a petition for reconsideration on October 6, 1941 (R. 25). The principal allegations of the complaint were that the Commission erred as a matter of law in restricting appellant to contract operations with shippers of certain classes, and with respect to specific commodities for said classes of shippers, resulting in a discrimination against contract carriers by motor vehicle in favor

of common carriers by motor vehicle; that the decision unlawfully prohibited his substituting or adding shippers other than packing houses and food canneries; that the examiner and the Commission erred in excluding evidence as to his operations; that the Commission's action on the Kraft contract was erroneous; and that a fair hearing was denied (R. 5–8).

Answers were filed by the Commission and by the United States denying the material allegations of the petition. Interventions were filed in support of the order by the Common Carrier Division of the American Trucking Associations, Inc. and the Illinois-Minnesota Motor Carriers' Conference, and in support of the relief sought by the Contract Carrier Division of the American Trucking Associations, Inc. The Kraft-Phenix Cheese Corporation also intervened on behalf of the appellant (R. 333).

The case was fully considered by the statutory court below, which devoted two days to the argument (R. 349) and, on July 24, 1942, filed an opinion, sustaining the Commission in all respects (R. 332-346). By its findings of fact and conclusions of law, entered on the same day (R. 346), the court affirmed the findings of the Commission as being within its statutory authority and supported by substantial evidence. On August 12, 1942, the court below stayed the Commission's order pending appeal to and determination by this Court (R. 357).

SUMMARY OF ARGUMENT

I

Appellant filed with the Interstate Commerce Commission an application for a permit as a contract carrier by motor vehicle. Following full hearings, the Commission found that appellant, under individual contracts, performed services during the "grandfather" period for the food canneries or meat-packing businesses of Swift & Company and Libby, McNeill & Libby by transporting in a described area "canned foods, fresh meats, dairy products, and packing-house products and supplies", the last classification embracing a wide and diversified character of commodities incidental to the main business of meat packing or food canning. Acting under the authority contained in Section 209 (b) of the Interstate Commerce Act to "specify in the permit the business of the contract carrier covered thereby and the scope thereof", the Commission found that appellant, as a contract carrier by motor vehicle, should be granted a permit to do what the evidence showed he had done during the "grandfather" period, namely, to transport the above-named commodities in the area described for "persons" (as defined in the Act)[4] who

[4] Section 203 (1) (49 U. S. C. 303 (1)) provides that—

"The term 'person' means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof."

"operate food canneries or meat-packing businesses".

It is argued that the court below improperly held that the Commission was authorized to limit the permit to a particular class of shippers (persons who operate food canneries or meat-packing businesses), but an analysis of Section 209 of the Act reveals that the Commission was empowered to make such a limitation. If appellant were permitted to transport the widely diversified commodities falling within the generic term "packing-house products and supplies" for anyone in this populous territory, he would be converted from a contract carrier, the category in which he voluntarily asked the Commission to be placed, to a common carrier (one which holds itself out to transport for the public generally). And under such a permit giving appellant unrestricted rights as a contract carrier of "canned goods, fresh meats, dairy products, and packing-house products and supplies," appellant would be within his rights in abandoning entirely his past highly-specialized refrigerated service for packing houses and canners and invading the service fields of other carriers, both common and contract, so long as he hauled one of the diverse commodities used or sold by packers or canners.

II

The Commission did not err in refusing to permit operations under a contract with the Kraft-

Phenix Cheese Corporation. On June 1, 1935, prior to the "grandfather" date, appellant entered into a contract with Kraft to perform its transportation service. No transportation was performed under that contract until March 1936, eight months later. Consequently, the Commission held that the phrase "bona fide operation" in the "grandfather" clause (sec. 209 (a)) did not encompass operations which were merely planned or intended to be performed at some time in the future. Mere intention to operate is not enough. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480; *McDonald* v. *Thompson*, 305 U. S. 263, 266; see *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 83. Furthermore, after the decision of the lower court in this case, appellant was authorized by the Commission to perform operations under the contract with Kraft. *Noble Extension of Operations—Points in Illinois, Wisconsin and Minnesota*, 34 M. C. C. 671.

III

Recent decisions of this Court have so clearly sustained the authority of the Commission to impose territorial limitations in grants of motor-carrier operating rights that further discussion seems unnecessary. *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. Moreover, the reason for the imposition of the terri-

torial limitations herein is fully explained in the Commission's report and does not appear to be seriously questioned.

IV

A full and fair hearing was granted. The hearing before the Commission extended over 3 days; appellant filed a brief, exceptions to the recommended report, and in his petition for reconsideration, following the decision of Division 5, he advanced fully his reasons why the petition should be granted. Due process was satisfied; oral argument is not a prerequisite to due process. *Morgan* v. *United States*, 298 U. S. 468, 481.

ARGUMENT

I

THE COMMISSION PROPERLY LIMITED THE PERMIT BY SPECIFYING THE TYPES OF BUSINESS FOR WHICH APPELLANT WAS AUTHORIZED TO HAUL

Introductory.—Section 209 (a) of the Interstate Commerce Act provides that no person shall engage in the business of a contract carrier by motor vehicle[5] in interstate commerce without a permit issued by the Commission authorizing the

[5] Section 203 (a) (15) (49 U. S. C. 303 (a) (15)) provides: "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

operation. The "grandfather" clause of that Section declares that if a carrier "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, * * * and has so operated since that time," the Commission shall issue a permit without requiring proof that the operation will be consistent with the public interest and the policy of the Act (see 79 Cong. Rec. 5654). Section 209 (b) covers in part operations instituted after the "grandfather" date and provides for the issuance of a permit upon proof by the applicant that it is fit, willing, and able to perform the proposed operation and that the proposed operation will be consistent with the public interest and the national transportation policy. This Section also contains the following provision, involved here:

> * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under sections 204 (a) (2) and (6): *Provided however* that no terms, conditions, or limitations shall restrict the right of the carrier to

substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

A contract carrier by motor vehicle is one which engages in transportation under individual contracts or agreements (see n. 5, *supra*, p. 16). A common carrier by motor vehicle[1] is one which holds itself out to the general public. These distinctions are of importance in this case (see *infra*, pp. 35–39).

The essential characteristic of the individual contract or agreement between a contract carrier and a shipper is the integration of the carrier's operations with the shipper's business, as the present record strikingly illustrates. A very substantial part of Swift's transportation need, for example, is the distribution of its products and the transfer between its various plants of centrally

[1] Section 203 (a) (14) (49 U. S. C. 303 (a) (14)) provides: "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

purchased supplies and materials. Swift could accomplish this distribution through its own equipment as a private carrier, but for satisfactory reasons it chooses not to do so. Swift could also distribute through the medium of common carriers, but common carriers are at the beck and call of the general public and Swift consequently finds it more convenient to perform the transportation part of its business through an independent contractor who undertakes for compensation to haul subject to Swift's directions.

The contract carrier is characterized by the rendition of a service which meets the peculiar needs of a particular shipper and which results in a specialization not to be found in the service rendered by a common carrier. Such transportation service is normally rendered, as in this case, for one or two shippers, the carrier becoming in effect a part of the business of the shippers it serves. The contracts which appellant entered into with Swift and Libby typify the individual contract which distinguishes the contract carrier.[7]

[7] The subject of contract carriers is fully discussed in *Contracts of Contract Carriers*, 1 M. C. C. 628; *Filing of Contracts by Contract Carriers*, 2 M. C. C. 55; *Craig, Contract Carrier Application*, 28 M. C. C. 629; *Doudell, Contract Carrier Application*, 17 M. C. C. 684. In the *Craig* case, the Commission said (pp. 633–634):

"* * * As we have already indicated, the most obvious case of a contract carrier is one rendering a highly specialized service meeting the peculiar needs of a particular shipper under a contract which speaks with relation to the existing

A. SECTION 209 OF THE INTERSTATE COMMERCE ACT EMPOWERS THE COMMISSION TO LIMIT "GRANDFATHER" PERMITS TO THE CLASS OF SHIPPERS SERVED

The Commission found that on July 1, 1935, appellant was engaged in the business of transporting certain commodities for Swift & Company, a packing house, and Libby, McNeill & Libby, a food cannery, under individual contracts with them, and that he has continued that business since the "grandfather" date (R. 23).

Appellant's principal operations under these contracts with Swift and Libby were found to have consisted in rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul, Minnesota, for deliveries to Wisconsin points, following which the truck proceeded to Chicago or Blue Island (a point in the Chicago area) to pick up loads at the plants of Swift or Libby for Minnesota delivery (R. 17, 21). The shipments

---

situation. On the other hand, as the degree of specialization diminishes and as the number of shippers served increases, a general holding out to serve the public, or a class or classes thereof, becomes evident, and the operation approaches that of a common carrier.

* * * * * *

"Of course, in the final analysis both these criteria, specialization and number of shippers served, relate back to the fundamental question of holding out. One who proposes or offers a specialized service fitting the needs of a particular shipper or shippers has nothing to hold out to the public generally. On the other hand, the making of a large number of contracts, while not conclusive, strongly suggests a general holding out in the absence of some explanation."

from Blue Island were found to have consisted only of canned foods, but from Chicago and South St. Paul they were found to have consisted of canned goods, meats, various packing-house products, dairy products, and innumerable supplies used in conjunction with the manufacture or distribution of those products (R. 21). While the Commission acknowledged that appellant had transported a wide range of commodities, it also found that "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products and supplies in the manner hereinbefore described" (R. 22).

When the Commission determined that appellant was a "grandfather" contract carrier and entitled to the issuance of a permit to continue that business in which he was engaged on July 1, 1935, the problem arose as to the specifications to be included in the permit. The duty of the Commission to find from the evidence whether or not appellant was in *bona fide* operation as a contract carrier (sec. 209 (a)) is not the only burden imposed upon the Commission by the statute, for Section 209 (b) states that—

> * * * The Commission shall specify in the permit the *business* of the contract carrier covered thereby and the *scope* thereof * * *. [Italics supplied.]

518563—43——4

The Commission must, from the evidence, ascertain the nature of the business and specify or describe that business in the permit. Because appellant handled such widely diversified commodities as empty hogsheads, broken glass, hoops, thermometers, soap, bolts, gate locks, stationery, etc. (R. 21), he contends (Br. 12, 41) that the carriage of these widely miscellaneous articles made him a carrier of general commodities. These numerous commodities, all includible in the term packing-house supplies, were, however, carried only as an incident to the operation under the individual contracts between him and the two shippers served (R. 16, 21).

Consequently, the Commission, weighing the evidence before it, determined that the proper permit for appellant was as a contract carrier by motor vehicle, in a described area, of certain commodities under individual contracts with persons "who operate food canneries or meat-packing businesses" (R. 23). As a basis for this order, the Commission relied on the authority conferred on it by the statute to "specify in the permit the business of the contract carrier covered thereby and the scope thereof;" it said (R. 22):

> * * * The question of the form of authority to be granted to contract carriers of retail-food store commodities was considered at length in *Keystone Transp. Co. Contract Carrier Application,* 19 M. C. C.

476, and the same problem with respect to defining the business of applicant and scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications.

In the *Keystone* case, *supra*, the Commission stated (p. 493):

> The phrase "the business of the contract carrier * * * and the scope thereof" plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and *precise character of the service* to be rendered by such carrier. When so considered, it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used; and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store. [Italics supplied.]

And Chairman Eastman stated in his concurring opinion in the *Keystone* case (p. 499):

> * * * the phrase "the business of the contract carrier * * * and the scope

thereof" means more than "just the business of being a contract carrier within a defined territory" and connotes in addition the "exact and precise character of the service to be rendered by such carrier." If * * * the "exact and precise character" of that service can sometimes be closely and accurately defined only by reference to the class of shippers that was being or is to be served, there is nothing whatever in the act which precludes us from so defining it, and in fact it is our duty to do so.

B. ANALYSIS OF SECTION 209

Appellant contends (Br. 24–25) that the statutory direction to the Commission to "specify in the permit the business of the contract carrier covered thereby and the scope thereof" (paragraph (b) of sec. 209) is applicable only to new operators and not to "grandfather" applicants. We think it clear, however, that the Act contemplates no different permits in the case of new applicants than in the case of "grandfather" clause applicants, and that any restriction or limitation on the authorized business or operations of an applicant may, where consistent with the operation on the critical statutory date, be employed in a "grandfather" clause permit.

Appellant's contention is answered by the language of Section 209. Contract carrier operations are prohibited by paragraph (a) thereof "unless there is in force * * * a permit is-

sued by the Commission." The "grandfather" clause which immediately follows provides that "such permit" shall be issued. It is therefore readily apparent that only one type of permit is contemplated. Furthermore, the "grandfather" clause is expressly linked to paragraph (b) since the permit is to issue "if application for such permit was made to the Commission as provided in paragraph (b)."

The Commission has consistently interpreted the two paragraphs as being interrelated in cases holding that the phrase "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof" (sec. 209 (b)) applies to "grandfather" permits, and that such permits should thus be limited to the territories served and commodities carried[*] before July 1, 1935, the date on which "grandfather" rights crystallized. *Motor Convoy, Inc., Contract Carrier Application,* 2 M. C. C. 197; *Wible, Contract Carrier Application,* 7 M. C. C. 165; *Caravans, Inc., Contract Carrier Application,* 9 M. C. C. 659; *Hunter, Contract Carrier Application,* 13 M. C. C. 109; *Storch Trucking Co., Inc., Contract Carrier Application,* 17 M. C. C. 349; *Marine Trucking Co., Inc., Contract Carrier Application,* 17 M. C. C. 615. Where, as

[*] Appellant really admits that the paragraphs are interrelated since he does not challenge the Commission's power to restrict permits in this respect.

here, there has been a settled construction of a statute by the administrative authorities entrusted with its application, such construction will not be lightly disturbed by the courts. See, *e. g., Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488. It has been held that this is especially true of constructions by the Commission of the language of the Motor Carrier Act in view of the fact that the Commission proposed it to Congress. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Under the doctrine of the cases, *supra*, p. 25, holding that the permit specification clause of Section 209 (b) applies to "grandfather" carriers, there is no incongruity in specifying in the permit the type of business served by the applicant before the "grandfather" date, and the Commission has followed this practice in appropriate cases consistently since 1939.* *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475; *Marianelli, Contract Carrier Application*, 22 M. C. C. 142; *Koelker, Contract Carrier Application*, 22 M. C. C. 474; *Shipman Bros. Transfer Co., Contract Carrier Application*, 23 M. C. C.

* *Longshore, Contract Carrier Application*, 2 M. C. C. 480, which appellant cites as holding to the contrary (Br. 10, 28), was decided in 1937 and is discussed, *infra*, pp. 30–31.

355; *Red Circle Freight Lines, Inc., Contract Carrier Application*, 24 M. C. C. 319; *Puzio, Contract Carrier Application*, 26 M. C. C. 555; *Knight, Contract Carrier Application*, 30 M. C. C. 500. The reenactment of Section 209 without change in the Transportation Act of 1940 after its prior construction by the Commission is a persuasive indication of Congressional approval. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114, 115; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

Appellant asserts (Br. 48–49) that the legislative history of Section 209 reveals that the Commission may not restrict a contract carrier's operations to the type of business served. Reliance is placed on an amendment to Section 209 (b) by the Senate Committee on Interstate Commerce. As introduced, the pertinent part of that Section read:

> * * * The Commission shall specify in the permit the operations covered thereby. * * *.

However, the Senate Committee on Interstate Commerce amended the Section by adding "and the scope thereof" and by substituting "business of the contract carrier" for "operations". 79 Cong. Rec. 5664. The amendment was agreed to, and the Section thus provides:

> * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof * * *.

Obviously, the changes gave the Commission wider latitude in determining the proper specifications for a permit than did the bill as introduced.[10]

The following statement by Senator Wheeler is cited as calling for a contrary conclusion:

> * * * This section [Section 209] has been changed in lines 19–22, page 27,[11] to make clear that the bill applies to the business of contract carriers and *not merely* to particular operations under the individual contracts. [Italics supplied.] (79 Cong. Rec. 5654.)

Since the Senator was speaking of the first sentence of Section 209 rather than of the permit specification clause (see 79 Cong. Rec. 5664), he was explaining that the bill as a whole was intended to have a broad application. A potential loophole was being closed. Even had the Senator been referring to the permit specification clause, the quotation would not militate in the slightest degree against the construction adopted

---

[10] These changes were evidently made at the Commission's request. See Hearings, S. Committee on Interstate Commerce, S. 1629, 74th Cong., 1st sess., p. 123; 79 Cong. Rec. 5651.

[11] This amendment altered Section 209 (a) as follows:

"Sec. 209 (a). No person shall engage in [any] *the business of a contract carrier by motor vehicle in* interstate or foreign [operation] *commerce* on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit * * *." (79 Cong. Rec. 5664.)

by the Commission and the court below. As the Commission stated in *Keystone Transp. Co., Contract Carrier Application,* 19 M. C. C. 475, 492–493:

> Here again there is no confusion of thought, but merely a clear statement of our powers and duties in connection with the granting of permits by either of the two methods above mentioned. First, we shall specify in the permit "the business of the contract carrier covered thereby and the scope thereof." The phrase "the business of the contract carrier * * * and the scope thereof" plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier. When so considered, it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store.
>
> This construction is not a strained or unnatural one and does not conflict with the expression of Senator Wheeler above referred to. Obviously the business of all contract carriers is not the same. * * *

It is also said (Br. 26) that the so-called restriction would impinge on appellant's right under Section 209 (b) "to substitute or add contracts within the scope of the permit" to be granted. The words "within the scope of the permit" are controlling. Actually, this provision of Section 209 (b) does not come into operation until "the scope of the permit" to which an applicant is entitled has been determined. If the circumstances surrounding appellant's past operations are such as to justify and require imposition of the restriction in question, then the "scope of the permit" is correspondingly limited, but there is no diminution of the right to substitute or add contracts "within the scope of the permit." Appellant will remain as free as ever to substitute or add as many contracts as he chooses within the specialized field in which he has long since elected to operate.

The claim is made (Br. 10, 14, 28–39) that the Commission's decision in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475, is in conflict with its decision in *Longshore, Contract Carrier Application*, 2 M. C. C. 480. The *Longshore* case was decided early (July 23, 1937) in the Commission's administration of the Motor Carrier Act, 1935, while the Act was still in the experimental stage. Greater experience under the Act would not prevent the Commission from reaching an opposite conclusion. Cf. *Vir-*

ginian Ry. Co. v. *United States*, 272 U. S. 658, 663. But the two decisions are reconcilable, as recognized by the district court, which said: "the facts in that case [*Longshore* case] were such as not to require a specification of the class of shippers, as a permit without such limitation would not enable the carrier under the circumstances to extend his operations to the transportation of general commodities for a large number of shippers" (R. 342), and further:

> The inherent nature of the business in the Longshore case constituted an effective restriction, while the same specification in the business in the Keystone case as that adopted in the Longshore case would have permitted the carrier to engage in the transportation of general commodities for all shippers. While the specification of the business in the Longshore case was suitable under the facts in that case, it did not meet the requirements of the Keystone case. In the Longshore case the Commission went as far as it needed to go under the circumstances while in the Keystone case it was required to impose an additional limitation to avoid authorizing the transportation of general commodities for all shippers. In the instant case the Commission undoubtedly followed its decision in the Keystone case because of the similarity of facts. (R. 342.)

Appellant (Br. 31, 36, 41, 60) relies upon this Court's decision in *United States* v. *Carolina*

Freight Carriers Corp., 315 U. S. 475. That case, however, dealt with common carriers, not with contract carriers, and in no way impugned the previous decisions of the Commission relating to the latter. The provisions of the Motor Carrier Act regulating common carriers (secs. 206–208), upon which the *Carolina* decision turned, are quite different from those regulating contract carriers; and they do not contain the language of Section 209 involved in the case at bar. Congress has carefully differentiated between the two classes of carriers, and extension of the holding in the *Carolina* case to contract carriers would serve to nullify the distinction which Congress has recognized and the Commission correctly applied. See *infra*, pp. 36–39; see also H. Rep. No. 1645, 74th Cong., 1st sess. p. 4.

It is urged (Br. 29, 32) that because of a statement in the Commission's report in the *Keystone* case, *supra*, concerning a restriction similar to that involved here, the Commission is trying to regulate contract carriers generally for the benefit of common carriers. But the only portion of the *Keystone* report that is relied upon in this case is an

---

It is said (Br. 18, 45–46) that Congress disapproved the *Keystone* case by removing the word "special" when in the Transportation Act of 1940, it amended Section 203 (a) (15) to read:

"The term 'contract carrier by motor vehicle' means any person [, not included under paragraph 14 of this section, who or] which, under [special and] individual contracts or agreements, [and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.] *en-*

affirmance of the Commission's interpretation of Section 209 (b) as to the form and scope of the permit. Not a word is said herein about regulating contract carriers for the benefit of common carriers. The *Keystone* case, based on a different record, is not of course in issue here, nor was its holding ever attacked in court. The Commission is not attempting to regulate contract carriers for the benefit of common carriers, but its regulation of any particular type of carrier is in part for the protection of all other carriers, both common and contract.

---

gages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." (54 Stat. 920.)

Congress had no such intent, as is made plain in the following statement on the floor of the Senate by Senator Truman, who was a member of the Senate Committee on Interstate Commerce and a sponsor of the Transportation Act of 1940:

"The conferees wish to make it plain that it is not their intention, by changing the language of paragraphs (14) and (15) of section 203 to change the legislative intent of the Congress one iota with respect to definition of common and contract carriers other than those performing pick-up, delivery, and transfer service. It is intended that all over-the-road truckers shall whenever possible fall within the description of common carriers.

"It is intended by the definition of contract carriers to limit that group to those who operate under individual contracts and who render a specialized service which is required by the peculiar needs of a particular shipper and who do not come within the definition of common carriers." (86 Cong. Rec. 11546.)

C. TO SATISFY THE POLICY OF THE ACT, THE "GRANDFATHER" PERMIT INVOLVED MUST BE RESTRICTED TO THE CLASS OF SHIPPERS SERVED.

If the business of a contract carrier could not be defined by reference to the class of shippers served, companies transporting many types of commodities under contract with a single chain store operator (as in the *Keystone* case), or for one or two manufacturing concerns dealing in many products (such as Swift in the present case), would be entitled to the equivalent of a general license allowing them to carry all such commodities for all shippers. In such circumstances, a permit not limited to the class of shippers under contract on the "grandfather" date [13]

[13] The following are examples of limitations as to the type of shippers for whom transportation may be rendered: "persons * * * who operate wholesale grocery houses, the business of which is the sale of food, of such merchandise as is dealt in by wholesale food business houses", *Jones, Extension of Operations*, 21 M. C. C. 470; "persons * * * who operate chain retail and mail-order department stores, the business of which is the sale of general commodities, of such commodities as are dealt in by such stores", *Stepanek, Contract Carrier Application*, 21 M. C. C. 612; "persons * * * who operate chain department stores, of such commodities as are dealt in by such stores", *Koelker, Contract Carrier Application*, 22 M. C. C. 474 ("grandfather" rights); "persons * * * who operate chain retail and mail-order department stores, the business of which is the sale of general commodities, of such commodities as are dealt in by such stores", *Inter-City Transport & Motor Co., Extension of Operations*, 22 M. C. C. 588; "persons * * * who operate retail department stores, of such merchandise as is dealt in by such stores", *Wilgis, Common Carrier Application*, 23

would not accurately define the scope of an applicant's prior operations or preserve the "parity between future operations and prior *bona fide* operations which the statute contemplates." *Alton R. Co.* v. *United States*, 315 U. S. 15, 22.

The Commission necessarily must have the authority to prescribe such limitations in a contract carrier's permit as will correctly specify its business and guarantee that the contract carrier operation will not be converted into common carriage. It would not be sufficient for the Commission to specify appellant's business as being that of a contract carrier without further limitation. His business cannot be accurately described in terms of the diversified commodities transported but only in terms of the service provided, *viz.*, service rendered persons "who operate food can-

---

M. C. C. 87; "persons * * * who operate meat-packing houses, the business of which is the sale of meat and packing-house products * * *, of meat and packing-house products, and of advertising material used to promote the sale of these commodities", *Clancy, Common Carrier Application*, 24 M. C. C. 727 ("grandfather" rights); "persons * * * who operate wholesale electrical supply houses, the business of which is the manufacture or sale of electrical supplies, of such commodities as are dealt in by wholesale electrical supply houses" and "persons * * * who operate wholesale bakers' supply houses, * * * of such commodities as are dealt in by wholesale bakers' supply houses", *H. B. Church Truck Service Co., Common Carrier Application*, 27 M. C. C. 191 ("grandfather" rights); "persons who operate meat-packing plants, and their subsidiaries, of such merchandise as is dealt in by meat-packing companies and their subsidiaries", *Beckley, Contract Carrier Application*, 27 M. C. C. 405 ("grandfather" rights).

neries or meat-packing businesses" (R. 23). Unless appellant is limited to the actual function performed, described in terms of the dominant business served, he will be able to change or expand his past operations and invade the service fields of other carriers, both common and contract, without any proof of consistency with the public interest. In fact, in the complaint filed in this case, appellant alleges he has entered into 120 contracts, 83 still in force, to transport the same commodities which had been transported under contracts for Swift and Libby (R. 11; see Br. 6). This allegation illustrates how a contract carrier, restricted only to commodities, could transform itself into a common carrier, operating under a contract carrier permit and free from the more exacting statutory requirements of common carriers."

Under the provisions of Section 218 (b), the Commission is required, in considering minimum charges, to see that no advantage should be given

---

"Quite obviously, if, upon the hearing before the Commission, appellant had denied that he was limiting or restricting his business to a class of shipper and certain commodities, he would have been compelled to take the position that he was offering this service to all shippers, and hence, would have been classified as a common carrier. The record contains his own statement that he was a *contract* carrier (See R. 38, 57, 199, 200). Appellant wished to continue as a contract carrier because he had the benefit of filing low minimum schedules of rates, an advantage over common carriers with fixed maximum and minimum rates.

to contract carriers in competition with common carriers, who must, under Sections 216 and 217, publish and observe specific rates, accept all tendered shipments and charge the same rate to all persons, under severe penalties for violations. Congress applied no such stringent regulations to contract carriers who may charge a different rate to one shipper than to another and refuse to accept any shipment not desired. They may refuse service to any shipper or to any community in the territory served. Common carriers cannot. The restraint which Congress did provide for contract carriers, obviously to avoid unrestrained competition that would destroy motor carrier efficiency (see the declarations of policy in the Motor Carrier Act, 1935 (sec. 202 (a), 49 Stat. 543) and the Transportation Act of 1940 (sec. 1, 54 Stat. 898); see also S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3; S. Doc. No. 152, 73rd Cong., 2d sess., p. 33), is to be found in the requirement of Section 209 (b) that the scope of the business be specified in the permit, and in the requirement of Section 218 (a) that the minimum rates be published.

In addition to the possibility of his becoming a common carrier, appellant, if entitled to unrestricted operating rights as a contract carrier of "fresh meats, canned goods, dairy products, and packing-house products and supplies" (R. 23), would be within his rights in abandoning

entirely his past highly specialized refrigerated service for packing houses and canners, and in invading the service fields of other carriers, both common and contract, so long as he hauled one of the diverse commodities used or sold by packers or canners. Thus with ordinary (rather than refrigerated) equipment, he might abandon the packers and canners and, without any proof of consistency with the public interest, begin hauling sugar (which is used by packers to some extent and is therefore a packer's "supply") for a sugar producer, or machinery, such as cooling equipment, for a manufacturer thereof, cans for a can producer, or fertilizer (a packer by-product) for a chemical company, regardless of the adequacy of the services of other carriers who are now serving such shippers.[15]

It is accordingly seen that there were substantial reasons why Congress separately treated common and contract carriers, and there is every

[15] As the court below said:

"* * * If the plaintiff is not limited to serving the classes of shippers with whom he had contracts on the crucial date he could engage in the transportation of an extensive list of goods, wares and merchandise for all shippers. The theory of the plaintiff may be illustrated, as follows: He hauled some paints, some articles of clothing and some hardware for Swift on the crucial date; therefore, he now has the right to haul paint for any paint manufacturer, clothing for any clothing merchant and hardware for any hardware dealer. Such elasticity is not contained in the grandfather clause and such a construction would prevent effective regulation of the transportation industry. (R. 343.)

public reason why the contract carrier should be limited to its field. This limitation is not one in the interest of the common carrier as against the interest of a contract carrier. It rests entirely upon the paramount consideration of the public interest. See 86 Cong. Rec. 11546.

Where only a few commodities are involved, a description in a permit in terms simply of commodities which may be transported and territory which may be served is ordinarily adequate. In situations like the present, however, where a vast number of diversified commodities is to be transported, a permit, in terms of commodities and routes alone, allows far too much flexibility and other qualifying terms are accordingly required.

After full consideration, the court below sustained the Commission's construction of the law and its authority to specify in the permit the business of the contract carrier and the scope thereof, so as to include shippers for whom the service was rendered, saying:

> Authority is expressly vested in the Commission, as we have observed, to "specify in the permit the business of the contract carrier covered thereby and the scope thereof." This is a significant provision of the Act and its interpretation is decisive of the principal issue in this case. The permit constitutes the carrier's authority to do business and the specifica-

> tions in the permit fix the limitations of the business; it may range from very limited to very extensive operations. The Act does not stop with conferring power to specify the business; it expressly adds the power to specify the scope of the business. There was a purpose in this additional provision. * * * The Commission has ample authority under the Act to designate the classes of shippers that may be served in addition to the classes of property that may be transported, in specifying the business and the scope thereof, if it is necessary or convenient to do so. The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier. (R. 340–341.)

Appellant is free to continue to haul for the shippers which he was serving on the "grandfather" date, and still serves, and under his "grandfather" permit he may substitute or add contracts of shippers in similar businesses. If he can show that his operation as a contract carrier in other fields would be consistent with the public interest, a permit may issue under the provisions of Section 209 (b). See *infra*, p. 44.

Appellant wishes, however, to be free to enter those other fields not as a new operator under Section 209 (b), but on the basis of his "grandfather" rights and without proof of any need for those new operations or of their consistency with the public interest or the national transportation

policy. To permit entrance into those other fields under the "grandfather" clause would be to permit him to engage in operations distinctly different from the specialized services rendered for Swift and Libby on the "grandfather" date. In *Alton R. Co. v. United States*, 315 U. S. 15, 23, this Court said:

> The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts.

Should the Commission grant to each of the large number of contract carriers who have engaged in a highly specialized service for a particular type of shipper a permit which would authorize each of them, despite the limited character of their past operations, to engage in virtually unlimited operations, it would not only be contrary to the intent of the "grandfather" clauses of the Act, but would substantially annul the certificate and permit requirements of Sections 206 and 209, in certain derogation of a sound and adequate transportation system.

II

THE COMMISSION'S ACTION WITH RESPECT TO THE KRAFT-PHENIX CHEESE CORPORATION CONTRACT IS CORRECT.

Appellant entered into a contract with Kraft on June 1, 1935, but conducted no operations

thereunder until March 1936. The Commission refused to include this contract as a part of appellant's "grandfather" rights on the ground that the mere existence of a contract to operate did not constitute *bona fide* operation within the meaning of Section 209 (a). (R. 17.) This conclusion is challenged on the grounds that non-operation for Kraft was an interruption of service over which appellant had no control, and that the refusal of the Commission to authorize operation under the Kraft contract constitutes an abrogation of the contract beyond the authority of the Commission (Br. 59–61).

Appellant's operation for Kraft was not interrupted because it had never commenced. Cf. *Benjamin Franklin Line, Common Carrier Application*, 1 M. C. C. 97, 99, 100. His undertaking to haul for Kraft was, on the "grandfather" date, merely written evidence of his willingness to serve. It may have been a *bona fide* agreement to operate, but the "grandfather" clause requires proof of *bona fide* operation. The "grandfather" clause was intended to preserve to the shipping public and to the carrier the transportation service being rendered on the statutory date and to require that operations instituted after that date meet statutory tests of public necessity or public interest. 79 Cong. Rec. 5654. A contract carrier's agreement to transport, unaccompanied by

actual operation, is not a transportation service within the meaning of the "grandfather" clause, and the Commission correctly held that appellant was required to secure authority for the Kraft operation on the basis of actual proof under Section 209 (b). Cf. *Loring* v. *United States*, 32 F. Supp. 464, affirmed, 310 U. S. 609. Otherwise a carrier could by "prophetic discernment" (*Sproles* v. *Binford*, 286 U. S. 374, 391) enter into a number of contracts to be performed in the future and thus greatly extend its operations.

In *McDonald* v. *Thompson*, 305 U. S. 263, 266, this Court said, in speaking of "grandfather" rights under the Motor Carrier Act, 1935:

> The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, *includes actual rather than potential or simulated* service, * * * [Italics supplied.]

See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480; *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 83.

With respect to the Kraft contract, the lower court stated:

> Undoubtedly, the statute contemplated actual operations on the crucial date and the grandfather rights are measured by the character and extent of the service then being rendered. Actual and sub-

stantial, rather than potential service, is essential under the law. The proviso confers a special privilege and extends only to carriers plainly within its terms. The execution of the written contract with Kraft is evidence of an intention to begin service, but it was nearly eight months before operations under it were commenced and that does not meet the requirements of the statute. If there had been any intention to recognize merely the existence of a contract as a basis for a permit Congress undoubtedly would have so provided. The decision of the Commission on this question must be sustained. * * * (R. 345.)

While insisting upon present authority to continue the Kraft service as a "grandfather" right, appellant has not ignored the opportunity provided by Congress in Section 209 (b) for procuring authority for the operation as in the public interest and consistent with the policy of the Act. On January 31, 1941, he filed an application with the Commission for this purpose and was granted authority to carry on his service under the Kraft contract. *Noble Extension of Operations—Points in Illinois, Wisconsin and Minnesota*, 34 M. C. C. 671; (see Br. 63-64).

It would therefore appear that appellant's complaint that the Kraft operation should have been authorized under the "grandfather" clause

is without merit, because of the reasons advanced in the Commission's report (R. 17) and because the question is moot.

III

THE COMMISSION RIGHTLY DEFINED THE TERRITORIAL LIMITS OF APPELLANT'S OPERATION

Appellant contends (Br. 53–55) that the Commission imposed unreasonable territorial restrictions upon his operating authority. The report of the Commission describes in considerable detail the territorial operations of the appellant (R. 18–21). These findings were upheld by the court below as supported by substantial evidence (R. 345), and appellant does not allege that they lacked support in the evidence. The authority of the Commission to impose territorial limitations has been so recently sustained by this Court (*Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475; *Howard Hall Co.* v. *United States*, 315 U. S. 495) that we see no occasion for further discussion of this phase of the case.[18]

[18] Emphasis is laid (Br. 55–58) by appellant upon a "balanced operation" argument and it is claimed Noble is denied the right to "a profitable back haul." The Commission found that "Applicant's principal operations have consisted of rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul for delivery to Wisconsin points, following which the truck proceeds to Chicago or Blue Island to pick up loads at the

IV

APPELLANT RECEIVED A FAIR HEARING

Appellant contends (Br. 64–69) that he was deprived of his constitutional right to a fair hearing in that he was not allowed oral argument, or to submit a written brief, on his petition for reconsideration of the order of Division 5. The court below held there had been a fair hearing (R. 345). Following the close of the testimony before the Examiner, appellant filed a written brief. Due process of law does not require argument, written or oral, on an application for rehearing. Furthermore, the petition for rehearing and reconsideration contained a full written statement of appellant's position. *Morgan* v. *United States*, 298 U. S. 468, 481.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court

---

plant of Swift or Libby, respectively, for delivery into Minnesota" (R. 17). Such being the nature and manner of his business on the statutory date, he is of course entitled to no greater authority under a "grandfather" application. If there is a public need for additional service, appellant may procure additional authority under Section 209 (b) by filing an application and proof that further operations are "consistent with the public interest." In fact, appellant has recently been granted authority to extend his operations as a contract carrier in *Noble Extension of Operations—Points in Illinois, Wisconsin, and Minnesota*, 34 M. C. C. 671, decided after the lower court's decision in this case.

should be affirmed, and the stay of the Commission's order vacated.

CHARLES FAHY,
Solicitor General.

WALTER J. CUMMINGS, JR.,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,

E. M. REIDY,
Assistant Chief Counsel,

ALLEN CRENSHAW,
Attorney,
Interstate Commerce Commission.

MARCH, 1943.

APPENDIX

Section 1 (the declaration of policy) of the Transportation Act of 1940 (54 Stat. 898) provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(14) of the Interstate Commerce Act, Part II, provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title (49 U. S. C. 303(a)(14)).

Section 203(a)(15) provides:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation (49 U. S. C. 303(a)(15)).

Section 204 (a) provides in part:

> It shall be the duty of the Commission—
>
> * * * * *
>
> (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration (49 U. S. C. 304 (a)).

Section 209 (a) provides:

> Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph

(b) of this section and such permit shall be issue or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * * (49 U. S. C. 309 (a))

Section 209 (b) provides:

Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Pro-*

vided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require (49 U. S. C. 309 (b)).

Section 218 (a) provides:

It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this

chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: *Provided,* That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act (49 U. S. C. 318 (a)).

Section 218 (b) provides:

Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in the Interstate Commerce Act, or is in contravention of any provision of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath (49 U. S. C. 318 (b)).

U. S. GOVERNMENT PRINTING OFFICE: 1933